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In the Supreme Court of the United States

October Term, 1980

DR. INGRE RUDOLPH PLANTE; Commissioner of Institutions and Agencies, ANN KLEIN; Medical Director of New Jersey State Hospital, New Jersey Mental Health Commissioner, DR. MARTIN WEINBERG; STATE OF NEW JERSEY, BRENDAN T. BYRNE, Governor; SUPREME COURT OF NEW JERSEY, RICHARD J. HUGHES, Chief Justice,

Petitioners

vs.

ALLEN BODINE SCOTT, by and through his Guardian, Michael J. Weintraub,

Respondent

AMICI CURIAE BRIEF IN SUPPORT OF THE GRANT OF A WRIT OF CERTIORARI on Behalf of Alabama, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Indiana, Iowa, Louisiana, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Virginia, Washington and West Virginia

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CONSENT OF THE PARTIES

Consent of the parties is not required since this brief is presented on behalf of the States or Commonwealths of Alabama, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Indiana, Iowa, Louisiana, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Virginia, Washington and West Virginia by their respective Attorneys General (hereinafter Amici). See U.S.S. Ct. Rule 36.4.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is not yet reported. The opinion of the United States District Court for the District of New Jersey is also unreported. Both opinions are reproduced in the appendix to the petition for a writ of certiorari of Dr. Ingre Rudolph Plante, et al.

STATEMENT OF THE CASE

Amici hereby incorporate by reference the Statement of the Case contained in the petition for writ of certiorari of Dr. Ingre Rudolph Plante, et al.[1]

INTEREST OF AMICI CURIAE

Each amici state has assumed a substantial role in providing care and treatment for the mentally disabled. See generally *Wilson v. Schweiker,* 49 U.S.L.W. 4207 (March 4, 1981). Likewise, the great and growing costs of such services are largely a state burden. Id. at 4211 n.19.[2] Many amici are now or have been defendants in federal litigation seeking to expand and restructure the services provided.[3] Other amici are or will be directly affected by the precedents established.

[1] Amici are not familiar with any of the events on which Scott asserts liability in this action and, thus, express no opinion with respect to his particular situation.

[2] During 1976 the cost of care at state mental hospitals exceeded $3.2 billion. The average daily census was approximately 180,000 persons. More than 600,000 persons received inpatient care at those hospitals during the course of that year. "Mental Health Statistical Note 153, Provisional & Patient Movement and Selective Administrative Data, State and County Mental Hospitals, Inpatient Services by State: United States 1976" (U. S. Department of Health, Education and Welfare, 1979).

[3] See, e.g., *Wyatt v. Ireland,* C.A. No. 3195-N (N.D. Ala.) (formerly *Wyatt v. Aderholt,* 503 F.2d 1305 (5th Cir. 1974)); *Goodman v. Parwatikar,* No. 76-1113-C-(1) (E.D. Mo.), (prior

These interests have led amici states to urge review in this Court of several decisions of the courts of appeals on the treatment rights of the mentally disabled. States have a substantial interest in obtaining the clearest and earliest possible guidance on these issues in order to effectively plan the delivery of services to the mentally disabled in the future.

Last term, six amici states urged this Court to issue a writ of certiorari to review the decision in *Halderman v. Pennhurst,* 612 F.2d 84 (3d Cir. 1979), *rev'd and rem'd,* 49 U.S.L.W. 4363 (April 20, 1981). There, the Court of Appeals held that the mentally retarded had rights to treatment and to treatment in the least restrictive environment under the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §6000 *et seq.* After certiorari was granted, twelve amici states joined Pennsylvania in seeking reversal on the merits. This Court reversed and remanded.

Earlier this term, thirty-five amici states and American Samoa urged review of the decision in *Romeo v. Youngberg,* No. 78-1982 (3d Cir., filed Nov. 24, 1980). In that decision, the Third Circuit held that the institutionalized mentally retarded had substantive due process rights (1) to receive treatment which is both acceptable in light of present medical or other scientific knowledge

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opinion, 570 F.2d 801 (8th Cir. 1978)); *Horacek v. Thone,* No. Cv-72-L-299 (D. Neb.) (formerly *Horacek v. Exon,* 357 F. Supp. 71 (D. Neb. 1973)); *Willie M. v. Hunt,* No. CC790924 (W.D. N.C.); *Davis v. Hubbard,* No. 73-205 (N.D. Ohio) (formerly *Davis v. Watkins,* 384 F. Supp. 1196 (N.D. Ohio 1974)); *Caruso v. Clarke,* C.A. No. 78-2519 (E.D. Pa.); *Doe v. O'Bannon,* C.A. No. 80-1763 (W.D. Pa.); *Haynes v. West Virginia,* No. 81-5046 (S.D. W. Va.).

and which is the least intrusive treatment available under the circumstances; (2) to be free of restraints, whether for treatment or protection, absent a showing of compelling necessity; and (3) to be protected from harm, however caused, absent a showing of substantial necessity.

Both *Halderman* and *Romeo* concern the treatment rights of the mentally retarded.[4] This case, in contrast, concerns the involuntarily committed mentally ill. This Court has cautioned that "careful attention must be paid to the differences between mentally ill and mentally retarded. . . ." *Kremens v. Bartley*, 431 U.S. 119, 135-36 (1977). Accordingly, the decision in *Halderman* has not resolved and any decision rendered in *Romeo* would not necessarily resolve the equally important issues raised by this case regarding the mentally ill. So that states may have clear guidance on this matter as well, amici respectfully urge that certiorari be granted.

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[4] *Halderman* further concerns a statute generally inapplicable to the mentally ill. See 42 U.S.C. §6001(7) (definition of "developmental disability").

REASONS FOR GRANTING THE WRIT

1. This case presents important and unresolved questions regarding the existence, source and scope of a constitutional right to treatment which warrant review by this Court.

In *O'Connor v. Donaldson*, 422 U.S. 563 (1975), this Court was asked to determine whether an involuntarily committed mental patient had a constitutional right to treatment. This Court declined to address that question, premising its decision instead on "every man's constitutional right to liberty." Id. at 573. This Court concluded:

> [a] state cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom with the help of willing and responsible family members or friends.

Id. at 576.

The issue reserved in *O'Connor* has continued to be a focus of litigation with inconsistent results. While many courts have found a right to treatment, few of those courts have agreed on the source and scope of that right.[5] On the other hand, the Fifth Circuit, once its leading proponent, now admits to "considerable doubts about the legal

[5] One commentator has discerned and criticized five separate theories relied on by courts supporting a right to treatment. Speece, *Preserving the Right to Treatment: A Critical Assessment and Constructive Development of Constitutional Right to Treatment Theories*, 20 Ariz. L. Rev. 1 (1978).

theory of a right to treatment." *Morales v. Turman*, 562 F.2d 993, 996 (5th Cir. 1977).

In *Scott*, the Third Circuit, per Judge Gibbons,[6] found that the involuntarily committed mentally ill have a right to treatment in the setting least restrictive of their personal liberty. In so doing, the lower court relied exclusively on its prior opinion in *Romeo*,[7] adopting in toto the substantive due process anaylsis espoused there. Similarly, the Court relied on *Romeo* in holding that use of other than the least restrictive treatment setting within a facility could be justified only under the "compelling necessity" standard (28a-29a).[8] Finally, the court sanctioned injunctive relief encompassing both Scott's course of treatment and conditions of confinement (24a-35a).

Amici submit that these holdings depart sharply from sound principles established by this Court. The court below has ignored this Court's admonition that courts are ill-

[6] Judge Gibbons also authored the Third Circuit's opinion in *Halderman*.

[7] The court stated as follows:

> In *Romeo* . . . we held that the involuntarily committed mentally retarded have a constitutionally protected right to treatment, and the analysis of that case is for Fourteenth Amendment purposes equally applicable to the involuntarily committed mentally ill.

(16a-17a). References to (a) herein refer to the Appendix filed by Petitioners in this matter.

[8] In *Romeo*, that standard applied to the use of restraints. Here it is extended broadly to evaluate conditions of confinement. While admitting both that "not all unpleasant conditions of confinement . . constitute 'gross deprivations' " and that "the line between punishment and discomfort is not always a bright one" (30a n.13), the court considered itself "well suited" to makes these distinctions. Id. The court relied on its prior opinion in *Halderman* in so holding (31a).

equipped to make clinical judgments in the baffling area of mental illness. *Parham v. J. R.*, 442 U.S. 584, 606-609 (1979). Similarly, it continues to create constitutional torts, again despite this Court's holdings to the contrary. *Estelle v. Gamble*, 429 U.S. 97 (1976); *Paul v. Davis*, 424 U.S. 693 (1976). The "compelling necessity" test adopted collides with this Court's rejection of that standard as to pretrial detainees in *Bell v. Wolfish*, 441 U.S. 520, 532 (1979). Although this Court has recognized that "[i]t is difficult to know what is meant by providing 'appropriate treatment' in the 'least restrictive' setting", *Halderman*, 49 U.S.L.W. at 4369, the Third Circuit has authorized precisely those inquiries. Finally, this Court has never found that the involuntarily committed have a right to treatment. See *Sanchez v. New Mexico*, 396 U.S. 276 (1970), dismissing for want of substantial federal question, 80 N. Mex. 438, 457 P.2d 370 (1968); *O'Connor, supra*, 422 U.S. at 587-589 (Burger C. J., concurring). See also *Halderman, supra*, 49 U.S.L.W. at 4367 n.12 (questioning whether Congress would have power to impose statutory right to treatment under Section 5 of the Fourteenth Amendment).

For these reasons, amici urge that the decision below be reviewed by this Court.

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2. In sanctioning awards of compensatory and punitive damages against high level state officials, the court below has misapplied principles of damages established by this Court.

Equally alarming to amici is that aspect of the decision below authorizing the award of compensatory and

punitive damages against defendants who, as New Jersey state officials, administer its mental health system. That ruling ignores at least two basic principles of damages established by this Court.

Liability under 42 U.S.C. §1983 hinges on the personal involvement of defendants in the injuries alleged. *Rizzo v. Goode,* 423 U.S. 362 (1976). Liability against supervisory officials, such as herein, may not be predicated on respondeat superior. Id. at 377; *Monell v. Department of Social Services,* 436 U.S. 658 (1978).

None of the defendants in this case were members of the plaintiff's treatment team nor were they responsible for his placement in the forensic unit. Rather, all were high level administrators. As such, they were responsible for the overall operation of New Jersey's mental health program and the effective expenditure of available funds. Significantly, however, it is the legislature, not any defendant, that weighs priorities and determines the amount of funds to be made available. Inevitably, it is the level of funding that determines the extent and quality of services which can be provided. Nonetheless, according to the Third Circuit, defendants in *Scott* and their counterparts in other states could face liability based upon the treatment provided each patient at every facility under their ultimate supervision. That holding conflicts with this Court's holding in *Rizzo v. Goode, supra,* and warrants review and reversal by this Court.

Equally troubling, the Third Circuit simultaneously announced new constitutional standards and sanctioned a damage award for violations of those very standards. That result conflicts squarely with the "good faith" immunity standard repeatedly recognized by this Court.

Procunier v. Navarette, 434 U.S. 555 (1978); *Scheuer v. Rhodes,* 416 U.S. 232 (1974).

State funded services for the disabled are rapidly expanding. Highly qualified administrators are acutely needed to design those programs and monitor their implementation. Public service often involves a financial sacrifice. The threat of broad monetary liability will inevitably discourage talented professionals from accepting these positions—to the detriment of the disabled themselves. Precisely these policy considerations have been recognized by this Court in fashioning immunity rules. *Wood v. Strickland,* 420 U.S. 308, 321 (1975).

Amici submit that the rulings on damages made below are erroneous and warrant review by this Court.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

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